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IN THE

# Supreme Court of the United States

NOS. 403, 404.

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GEORGE ASHWANDER, et al.,
*Petitioners,*

vs.

TENNESSEE VALLEY AUTHORITY, et al.,
*Respondents.*

---

## BRIEF OF *AMICUS CURIAE* WITH PETITION AND NOTICE

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SAM W. OLIVER,
*As County Attorney of*
*Tallapoosa County, Alabama.*

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**Notice of Motion for Leave to File Brief as Amicus Curiae.**

Notice is hereby given that the undersigned as attorney for Tallapoosa County in the State of Alabama will on the call of this case on the 19th day of December, 1935, or as soon thereafter as the case may be heard, present his motion for leave to file a brief in said cause as amicus curiae.

SAM W. OLIVER,
*As County Attorney of Tallapoosa County, Alabama.*

To:

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IN THE

SUPREME COURT OF THE UNITED STATES

Nos. 403, 404

GEORGE ASHWANDER, et al.,
Petitioners,

vs.

TENNESSEE VALLEY AUTHORITY, et al.,
Respondents.

**Petition for Leave to File Brief as Amicus Curiae.**

The undersigned, attorney for Tallapoosa County, in the State of Alabama, respectfully petitions this Honorable Court for leave to file a brief amicus curiae in the above entitled suit.

Your petitioner respectfully states that Tallapoosa County in the State of Alabama has an especial and peculiar interest in the questions presented by this record, and particularly in the theory or basis on which this question was decided by the Circuit Court of Appeals, namely: That the Federal Government, by virtue solely of its ownership of navigation dams, acquires a proprietary ownership of the water power created by the construction of such dams, and as a result thereof may directly enter into the permanent business of commercial production of electricity and

commercial transmission and distribution thereof throughout State domain in competition with privately owned utility systems

Tallapoosa County is a rural county containing no metropolitan area. It has, however, as a result of the established rate making policy of the State of Alabama, obtained the benefit of electric power rates from the Alabama Power Company, the utility which supplies electric power in the service of the public, no less advantageous than those which are available for textile and other manufacturing plants in the metropolitan areas within the State.

As a result of this long established state-wide equality there have been established within the said County, as in other rural counties within the State, a diversity of textile and other manufacturing plants which are on a fair competitive basis with plants elsewhere located in Alabama. Their power rates are, moreover, fully competitive with power rates in neighboring States and throughout the Tennessee Valley. This County therefore is under no industrial handicap from a power standpoint as compared with other areas in the Southern States.

There are also located within the said county important hydro-electric power or storage dams which, under the private ownership of the Alabama Power Company, are subject to taxation by the County, together with the transmission and distribution systems of the Power Company within the County. As a result this rural county realizes direct tax revenue from the active investment in these prop-

erties of the Power Company of more than $326,000 and $109,000 annually, in addition to substantial revenues from indirect sources, such as gasoline and franchise taxes and excise taxes. These sums are indispensable to the public welfare of said County, the maintenance of its schools and its governmental functions.

If, in accordance with the program of the Tennessee Valley Authority shown on this record, as directed by Section 11 of the TVA Act, and as publicly announced as to the investment of federal funds, the Government shall extend its competitive commercial operations and its commercial investments into the State of Alabama, the result, in so far as Tallapoosa County is concerned, will be in the following alternative.

1. The textile and manufacturing plants will be confronted with an immediate and permanent discrimination in the rates for power in competition with those industries which are to be supplied with TVA power directly by TVA or under TVA control. For instance, there is included in the accompanying brief, an excerpt from a current press announcement by the City of Bessemer, located in the Birmingham metropolitan district, which shows the discriminatory advantage which will follow the introduction of TVA current and rates in the Bessemer area. As made plain in the sub-joined brief, the proposed introduction of controlled TVA rates is in direct conflict with the existing theory of state-wide equality under which there has been effected decentralization of industry within the State of Alabama.

2. It is manifest on this record that the Alabama Power Company can not survive an extension of the TVA program throughout the State of Alabama, as is enjoined by Section 11 of the Tennessee Valley Authority Act. As in the case of the sales under compulsion of its properties in North Alabama, like sale or liquidation of its business will necessarily result with respect to the taxable investment of the Alabama Power Company within Tallapoosa County, resulting either in the compulsory transfer of those properties to the Tennessee Valley Authority or its nominees or agencies, or the permanent liquidation of the business and the direct loss of revenue to the County.

3. By subjecting the industries within the county to the radical discrimination shown on this record, these industries are doomed and this County is doomed to stagnation in competition with other areas. The removal or liquidation of existing industries in the County would paralyze its educational program and its governmental functions for lack of tax revenue to sustain them.

For the reasons stated, the said County is directly and necessarily interested in the basic insistence of the Tennessee Valley Authority on this record and in the extension of its program into other counties of the State of Alabama.

Respectfully submitted,

SAM W. OLIVER,

*As County Attorney of Tallapoosa County, as Amicus Curiae.*

## BRIEF OF AMICI CURIAE

### Statement

Tallapoosa County, within the State of Alabama, is a rural County in which the basic support of the inhabitants is that of agriculture. There are 3,794 farms within the County. There are no towns of large size within the County, nor is it within any metropolitan area with in the State.

Notwithstanding this fact, this County and its citizens enjoy uniformity of electric power rates under the public policy long established within the State of Alabama (Record Vol. II, p. 701-2).

This policy of the State of Alabama has received wide comment and approval.*

The introduction by the Federal Government of the radically lower TVA schedules, either by direct transmission and distributon by TVA or by the financing of transmission and distribution systems by TVA or associated Federal agencies, will destroy this principle of uniformity and will subject industry within the areas not thus supplied with TVA power, under TVA

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*President Roosevelt, when Governor of New York, said: "Therefore, the Alabama Public Service Commission laid down the rule that just because a man happened to be born and brought up on a farm in southern Alabama was no reason for penalizing him * * *. The result is that the rates laid down * * * in the State of Alabama provide substantially the same rate in the southern part of the State as in the northern part of the State. * * * I believe that principle is being fairly well recognized today not only among the Government Agencies but also among the more intelligent and more progressive of the utility people." (Conference of Governors, June 8, 1931).

controlled rates, to a marked and definite discrimination.

The current interpretation of this discrimination is illustrated by the public announcement made at a meeting of the City Council of Bessemer, held December 4th, 1935.**

The inevitable result of this extension of TVA service and controlled rates "in all directions from Muscle Shoals" will be to throw upon the remaining customers and service of the Alabama Power Company the burden of supporting the investment progressively as the customers are detached from the Power Company and attached to the TVA commercial system. Under the contracts or options in effect at the time of the filing of this suit, the Power Company would have lost 10,000 customers and a gross load of $750,000 per annum.

The direct and necessary result of this action will accordingly be to increase the existing level of Alabama Power Company rates and thus increase the discrimination.

The resulting added burden upon the industries of the County, upon its citizens and upon County revenues, is not to be doubted.

The inevitable effect of the extension of the TVA program and the absorption of the Alabama Power Company's business will be the exhaustion of the Ala-

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**The City's consulting engineer "predicted that many new industries would locate in Bessemer when cheap TVA power was made available." Birmingham Post, December 4th, 1935.

bama Power Company and compulsory sales of its properties to the Tennessee Valley Authority or its controlled agencies for distribution. This County can not in its present financial condition hope to invest public funds in plants or distribution systems.

It could, it is true, invite 100% federal investments in duplicate transmission and distribution systems and thus introduce TVA rates to the citizens; but this could not be done without acceptance of the economic soundness as well as the constitutional validity of the government's commercial electric program presented by this record.

The County authorities can not subscribe either to the economic or constitutional soundness of that program, either in its national aspects or in its effect upon local self-government and the support of the governmental functions of the County.

The county, therefore, is threatened with the withdrawal of the existing properties of the Alabama Power Company from taxation and the direct loss of indispensable revenue.

It is true that this loss in tax revenue might be supplemented by County operation of a TVA distribution system conducted under an increase in the rates of electric service substantially in excess of TVA schedules, if it were not for the fact that the government proposes to control the resale rates and the further fact that this increase in rates would in itself establish a discrimination against power consumers with-

in the County in favor of industries in those areas where the TVA rate schedules would not be increased.

A further complication in the situation is that the allotment of federal funds for projects of this character is attended by no known standard or test and rests solely upon the arbitrary decision of the Tennessee Valley Authority or the Public Works Administration. There is no assurance that the County would be accorded, within any reasonable time, any such loan or investment by the Government even if the said County should conceive that the combination of TVA commercial operation and federal investment in local projects were either sound economically or valid under the Constitution.

For these reasons, Tallapoosa County is constrained to protest against the basic invalidity of the Tennessee Valley Authority program, against the principles laid down by the Circuit Court of Appeals upon which it is sought to be sustained, and against the means by which and the ends to which public funds of the federal government are being diverted to active investments of the character indicated on this record.

## I.

## The Tennessee Valley Authority Program of Commercial Manufacture and Controlled Distribution of Electricity Is Unconstitutional

It is respectfully submitted that the situation confronting this County illustrates the complete displacement of the power of the State in respect to electric power distribution which would result from the Tennessee Valley Authority program.

Here is a state policy of uniformity in electric utility rates. The State has intentionally permitted the Alabama Power Company to serve generally the public throughout the State. It is not the sole electric utility within the State; it has been accorded no special treatment. But as a matter of fact the Commission has found that the advantages of a state-wide uniformity in rates can be conveniently made effective on the broad base of uniform schedules referable to a single utility fully regulated by the Commission. The Commission has, accordingly, granted certificates of convenience and necessity and has approved transfers of isolated utility ownerships to the Alabama Power Company under Section 9825 of the Code of Alabama (1923), and has thus made it possible for the Commission to establish complete uniformity.

Whether that policy be sound or economic is plainly for the State of Alabama to determine.

An illustration of the program of decentralization which will be destroyed by the program of TVA is

seen in the construction a few years ago of a series of ten textile mills under the ownership of a single organization known as Alabama Mills, Inc. Each of these mills was devoted to a different textile product. They were not congested at one point within the State where power rates might have been comparatively low, had the principle of uniformity not prevailed; but solely by reason of the fact that the power rates were uniform, the mills were located in ten different towns, in ten different Counties, drawing from ten different semi-rural labor pools. One of the mills was and is located in Tallapoosa County; and is at present engaged in successful operations.

By like reason of rate equality, Tallapoosa County has been able to locate a series of other mills and small industries which are absolutely indispensable to the welfare of the County, the employment of its citizens, and the maintenance of its governmental functions.

This equality of opportunity, with its decentralizing tendency, can not survive the discrimination of the TVA program, unless that program is to develop into a complete federal monopoly of power service within the State, with no regulation or control except the arbitrary discretion of three federal appointees. If they decided to abandon the Tenth Amendment by delegation of local functions to the federal government (contrary to established principles: *Knickerbocker Ice Co. v. Stewart,* 253 U. S. 149; *Wilkerson v. Rahrer,* 187 U. S. 77; *Cooley v. Board of Wardens,* 12 How. 299; *Gunn v. Barry,* 15 Wall. 610, 623; *U. S. v. DeWitt,* 9

Wall. 41), there is no assurance to Tallapoosa County that the Public Works Administrator will continue to finance federal investments for every County in the State of Alabama as a controlled distributor of TVA current. The investment allotted to Bessemer and Tarrant City, in a single County( Jefferson, in which Birmingham is located) carries an investment of more than $1,500,000, and reaches only the North Central portion of the State. There are 67 counties in Alabama now enjoying a substantial equality of opportunity in the matter of power rates. No one supposes that PWA stands ready to allot an additional $60,000,000 to $90,000,000 in order to extend equitably over the State of Alabama the TVA rate schedules, even if the Counties were willing as a matter of commercial compulsion to become participants in any such program.

In other words, there is inevitable in the administration and extension of the government program involved in this case a certain conflict with the existing public policy of the State and an interference with the abilty of the State and its authorities to make effective any public policy which it may desire to adopt.

For these reasons we assert that the program is directly and necessarily prohibited by the Tenth Amendment.

## II.

## The Theory of Proprietary Ownership of Water Power As an Incident to the Construction of a So-Called Navigation Dam, Is Directly Contrary to the Tax Cases and the Interstate Water Cases

The lack of justification for the conclusion reached by the Circuit Court of Appeals, predicated upon the so-called *Green Bay* Cases and the *Chandler-Dunbar* Case is demonstrated by petitioners' argument filed in this cause.

We set out briefly the equally plain conflict between that conclusion and the tax and interstate water cases.

### The State Tax Cases

*South Carolina Power Co. v. South Carolina Tax Com.*, 52 Fed. (2d) 515;

*Susquehanna Power Co. v. State Tax Com.*, 283 U. S. 291.

In the first of these cases the state taxed the business of generating hydro-electric power on a navigable stream at a dam erected and maintained under license of the federal government. The only justifcation for the federal license for the construction and maintanence of the dam was that the structure was in aid of navigation.

In the *South Carolina Power Company Case,* the Court (Parker, J.) asserted, "If this were an attempt

to tax the license granted by the federal government * * * or to tax a structure erected in aid of navigation, a different question would, of course, be presented." Both that case and the *Susquehanna Case* recognize that the license itself to do or create the thing which is in aid of the federal function can not be taxed by the state.

The erection of a power plant in a navigation dam is not a direct aid to navigation; but if, as is assumed by the Circuit Court of Appeals, the right to the use of the surplus waters not necessary for navigation, is directly subject to control or constitutes a proprietary right of the federal government as an incident to the construction of the dam, then the taxation of the use of those waters in the manufacturing process is a tax on the license or the federal right itself.

We, therefore, maintain that the use of the water in the process of manufacturing electricity can not possibly be referable to the commerce power and be an incident thereto without exempting the utilization of that process from state taxation.

If the government in the discharge of a governmental function leases property to an agency, that leasehold can not be taxed by the state.

If the government did in fact license to a private utility the right to use surplus water power in the exercise of the commerce power, the use of that water power could not be taxed.*

It follows that the Federal Water Power Act purporting to license the use of surplus waters contains

*See authorities cited, infra.

a misconception in terms. The government is licensing no such thing. As said by Petitioners, it can not barter the commerce power. It is licensing (or rather employing a private agency to build) a navigation dam and thereupon leasing the use of that dam.* The use of that dam, which is in itself an exercise of the power of navigation, can not be taxed by the state.

The use of the surplus waters can be taxed because they are not owned by the government, can not be leased by the government and are not leased by the government.

The statement in the opinion of the Circuit Court of Appeals that the government owns the "water power" as an incident to the construction of the dam is self-contradictory.

Water power is force, and not property. 61 *Corpus Juris* at page 184. The use of the force must rest on an easement or license and if this is acquired by the United States (for governmental use, since it can not be acquired for commercial use), it must be acquired by grant or condemnation; and if acquired and licensed by the government the use would not be taxable by the State.

It was held in *California v. Central Pac. R. R. Co.*, 127 U. S. 1, 38, 40, that a state assessment which included a federal franchise was invalid.

In *Railroad Co. v. Peniston*, 18 Wall. 5, 30, 36, it was held that a tax on property acquired in its own

*Precisely as pointed out in St. Anthony's Falls Water Power Co. v. Water Commission, 168 U. S. 349, 373, the grantees "may have acquired . . . the right to build dams . . . and the right to use such water as in fact and from time to time should flow down to their dam," asserting that this carried no guarantee as to undiverted flow of water, even if the legislature had the power.

right by a federal agency operating for profit might be taxed but that "a tax upon their operations is a direct obstruction to the exercise of federal powers."

And so, as to a tax on a lease by the government in the discharge of a governmental duty. *Shaw v. Gibson-Zalinise Oil Corp.*, 276 U. S. 575; *Indian Territory Illum. Oil Co. v. Oklahoma*, 240 U. S. 522.

> "A tax upon the leases is a tax upon the power to make them, could be used to destroy the power to make them." (ib.)

And see *Jaybird Min. Co. v. Weir*, 271 U S 609; *Gillespie v. Oklahoma*, 257 U. S. 501; *Choctaw O. & G. R. Co. v. Harrison*, 235 U. S. 292.

The last cited case is decisive of this question. The gross proceeds resulting from sale of coal mined under a lease of the Indian lands could not be taxed. Lease of Indian lands is no more a trust function than alleged lease of water power under the Commerce Clause.

This county denies absolutely that the generation of electricity at these dams by the Alabama Power Company is exempt from the hydro-electric tax under which that company paid for the last fiscal year the sum of $330,800 in the State of Alabama, in addition to ad valorem and other taxes.

The conclusion is inescapable that the right of licensees of the federal government who construct power dams in navigable streams to use the surplus waters is not derived from the the government and the use is for that reason alone subject to excise taxation by the state.

## III.

## The Theory of Ownership or Control of Surplus Waters As an Incident to the Regulation of Navigation Is Inconsistent With the Interstate Water Cases and the River Compacts

If the conclusion of the Circuit Court of Appeals, that the Federal Government by erecting a navigation dam acquires proprietary ownership of "water power" and control of surplus waters, is correct, then the great decisions of this Court in the interstate water cases are futile, as have been the interstate compacts as to the waters of navigable rivers which have been approved by Congress. It is sufficient merely to schedule these cases to demonstrate that the rights which the Court was there considering and adjudicating are wholly inconsistent with the existence of any such proprietary or discretionary right in the Federal Government. The fact is that in *Kansas v. Colorado,* 206 U. S. 46, the government attempted to assert the function assumed by the Circuit Court of Appeals in this case, and was not permitted by this Court to intervene because of the total absence of any basis even for the assertion of the claim.

These great cases are:

*Kansas v. Colorado,* 185 U. S. 208 (1901);
*Kansas v. Colorado,* 206 U. S. 46 (1907);
*Wyoming v. Colorado,* 250 U. S. 419; 260 U. S. 1 (1922);
*Connecticut v. Massachusetts,* 282 U. S. 660 (1931);
*New Jersey v. New York,* 283 U. S. 336 (1931).

Likewise, the interstate compacts which have been approved by Congress and the theory of those which are pending, is inconsistent with any such asserted proprietorship in the Federal Government. It is sufficient merely to make reference to the principal compacts outstanding and pending with reference to the apportionment of the surplus waters of navigable streams:

Colorado River Compact. For the text of this compact, see "The Hoover Dam Contracts," Wilbur and Ely, Gov't. Printing Office, 1933, pp. 387-390. The statute authorizing the negotiation of this compact is the Act of August 19, 1921, Ch. 72, 42 Stat. 171. The approval of the compact is found in Section 13 of the Boulder Canyon Project Act, Pub. 642, 70th Cong., approved December 21, 1928, 45 Stat. 1057.

The fact that navigation is a secondary characteristic of the Colorado River is definitely shown by Article IV (a) of the compact, providing that the use of the waters of the river for the purposes of navigation "shall be subservient to the use of such waters for domestic, agricultural and power purposes," and further subordinates the use of the stream for the generation of power to the use and consumption of the water for agricultural and domestic purposes, which were declared to be dominant. By the acceptance of the compact containing these expressions, Congress did not, indeed, and could not delegate even to the States its function of navigation, but it was an express recognition of the fact that the great and outstanding elements of value in the stream and in its surplus waters

were not referable to navigaton, but were within the proprietary and soverign ownership of the riparian States. See analysis of the compact by Mr. Hoover in response to an inquiry from the House of Representatives (Cong. Rec. Jan. 30, 1923, p. 2710; "The Hoover Dam Contracts," *supra*, p. 298).

Other interstate navigable river compacts include:

Delaware River Compact: Pennsylvania and New Jersey.

South Platte River Compact: Colorado and Nebraska.

La Plata River Compact: Colorado and New Mexico.

Ria Grande Compact: Colorado, New Mexico, and Texas.

Other interstate river compacts which are pending on submission to the respective States include the following:

Columbia River: Washington, Oregon, Wyoming and Montana.

Snake River: Idaho, Wyoming.

Yellowstone River: Montana, Wyoming.

Los Animas River: Colorado, New Mexico.

Cimmaron River: New Mexico, Oklahoma.

Red River: New Mexico, Oklahoma, Texas.

Pecos River: Same.

Rio Grande: Same.

Canadian River: Same.

Delaware River (Pollution of interstate rivers): New York, Connecticut and New Jersey.

Delaware River (Waters of interstate rivers): New York, Pennsylvania, New Jersey.

Red River: North Dakota, South Dakota, Minnesota: *North Dakota v. Minnesota,* 263 U. S. 565.

Belle Foursh and Cheyenne Rivers: South Dakota and Wyoming.

Arkansas River: Colorado, Oklahoma and Texas.

These vast efforts would be futile and useless if the great principles involved have been disposed of without analysis in a paragraph by the Circuit Court of Appeals, in a proceeding in which no sovereign state is a party. The contrary hypothesis is, we repeat, directly forced by the decision in *Kansas v. Colorado, supra,* and is plainly recognized in *Wisconsin v. Illinois,* 278 U. S. 367.

The contrary doctrine has, moreover, been recognized by the present Administration in acquiescing in the contention of the State of New York that the State and not the Federal Government is entitled to take over the control of the surplus waters of the St. Lawrence South of the American boundary for the generation of power or such other uses as the use of the surplus waters may require.* This might justify the diversion of these waters themselves to watersheds draining to the South, a possibility which is expressly recognized in *Connecticut v. Massachusetts, supra.*

The attention of this Court is directed to the fact that the present Administration, in its Interim Report, Power Series No. 1 of the National Power Survey of the Federal Power Commission, undertaken pursuant to Executive Order No 6251, August 19, 1933, under

*House Rep. No. 49, April 20, 1933; H. J. Res. 157, 73rd Cong., 1st Sess., April 26, 1933, Cong. Rec., p. 2441

the National Industrial Recovery Act (G. P. O. 1935) reports undeveloped water power in the United States aggregating 275,683,000,000 kilowatt hours potential in the navigable and tributary streams of the United States, as compared with a total annual production of electricity of all kinds (hydro, steam or other fuel) for the year 1925 amounting to 87,295,017,000 kilowatt hours. The suggestion that this vast water power has been extracted from the navigable and tributary streams from the soverign ownership of the States, and has been transferred to the Federal Government, is too preposterous for elaboration in argument.

The position of the State of New York, which has as a matter of practical effect been recognized as appropriate by the Federal Government, may be found in the "Report of the St. Lawrence Power Development Commission of the State of New York," submitted January 15, 1931 (Albany; J. B. Lyon Co., Printers, 1931), the legal staff being composed of Julius Henry Cohen, Esq., General Counsel, Kenneth Dayton, Esq., Chief of Legal Staff, and W. Charles Poletti and A. Mackay Smith, Esqs.

There has been considerable confusion of terminology and confusion of thought arising out of the transfer to the Federal Government of the phrases employed in the first Green Bay Case (*Kaukauna Water Co. v. Green Bay Canal Co.*, 142 U. S. 251), relating to the power of the State to condemn water rights, such, for instance, as in *Waters v. Phillips*, 284 Fed. 237 (CCA 7th, 1922), and in *Alabama Power Co. v. Gulf Power Co.*, 283 Fed. 606 (DC Alabama, 1922).

Assertions have been made and vigorously denied in the Senate of federal significance to these early expressions employed in cases involving the right of the State to condemn.

Counsel for TVA have in this proceeding referred, and as has been stated, inaccurately, to expressions from the War Department.

Mr. Taft as Secretary of War, in his comment upon the problem of the Des Plaines River, made plain, as was done in the opinion of this Court written by him in *Wisconsin v. Illinois*, 278 U. S. 367, 415 (1929), that the only function of the United States in the matter relates to navigation and to the control by the Government of the physical property which it constructs or authorizes in the regulation of navigation:

> "But with respect to the water-power on a navigable stream, which may be exercised without interference with the use of the river for navigation purposes, that is controlled by the laws of the State. It is controlled by the riparian ownership and by the common law as it governs those rights. Therefore I do not see with reference to this matter, that this department has any function to perform or which it can perform."—Report of the St. Lawrence Power Development Commission, *supra*, p. 172.

## Conclusion

It is respectfully insisted on this record that the Tennessee Valley Authority program is based in its entirety and in detail upon a complete misconception of the functions of the Federal Government and a complete encroachment upon and displacement of the revenues and the police powers of the States and their subdivisions.

Respectfully submitted,

SAM W. OLIVER,
*As County Attorney of Tallapoosa County, as Amicus Curiae.*